88-911

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

WALTER J. CEGELKA,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOHN D. SCHNEIDER*
705 Olive Street
Suite 815
St. Louis, Missouri 63101
(314) 421-2762

MICHAEL A. WOLFF
4144 Lindell Boulevard
St. Louis, Missouri 63108
(314) 652-7277

Attorneys for Petitioner

*Counsel of Record

St. Louis Law Printing Co., Inc., 13305 Manchester Road 63131 314-231-4477

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QUESTIONS PRESENTED

1. Whether intent to deceive is an element of the crime of making a false statement on a Medicare payment application [42 U.S.C. § 1395 nn (a)(1)], and thus whether the court erred in rejecting defendant's "good faith" instruction where such instruction is supported by the evidence.

2. Whether defendant was denied due process of law by the trial court's permitting the government to rely upon a insurance company newsletter to specify what conduct is required in filing Medicare payment applications where the newsletter was ambiguous in describing such requirements.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner Walter J. Cegelka respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in the above entitled proceeding, following an opinion rendered August 10, 1988, and denial of petition for rehearing September 28, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 853 F.2d 627, and is reprinted in the Appendix hereto, Appendix A, p1A, *infra.*

The order denying Cegelka's petition for rehearing en banc and rehearing by the panel is reprinted in the Appendix hereto, Appendix B, pA7.

The decision of the United States District Court for the Eastern District of Missouri (Hungate, D.J.) has not been reported.

JURISDICTION

The jurisdiction of this Court to review the judgment of the United States Court of Appeals for the Eighth Circuit is invoked under 28 U.S.C. § 1254(1).

Petitioner Walter J. Cegelka was convicted on three counts of violating 42 U.S.C. § 1395 nn (a)(1), for allegedly making false statements on an application for Medicare benefits, after trial in the United States District Court for the Eastern District of Missouri. Petitioner's conviction was affirmed by the Court of Appeals in an opinion rendered August 10, 1988; Petitioner's petition for rehearing en banc and rehearing by the panel was denied September 28, 1988.

STATUTE INVOLVED

42 U.S.C. § 1395 nn (a)(1) (Repealed, effective August 18, 1987, 101 Stat. 689).

> (a) *Making or causing to be made false statements or representations.*
>
> Whoever —
>
> > (1) knowingly and willfully makes or causes to be made any false statement or representation of a material fact in any application for any benefit or payment under this subchapter,
> >
> > . . .

> shall, (i) in the case of such a statement, representation, concealment, failure, or conversion by any person in connection with the furnishing (by that person) of items or services for which payment is or may be made under this subchapter, be guilty of a felony and upon conviction thereof fined not more than $25,000 or imprisoned for not more than 5 years or both, ...

STATEMENT OF THE CASE

Walter J. Cegelka, a psychologist and professor of behavioral studies at the University of Missouri St. Louis, filed Medicare claims for psychological testing performed at a St. Louis area nursing home. He assessed the mental, physical and personality function of twenty-one patients. He was indicted on nine counts involving sixteen of the claims: counts I-VI charged mail fraud violations of 18 U.S.C. § 1341, and counts VII-IX charged false representations on the claims, in violation of 42 U.S.C. § 1395 nn (a)(1). Counts IV-VI were dismissed for lack of evidence that the claims were filed by mail.

Counts I-III, on which he was acquitted, charged a scheme of making false representations that "he had received a referral from the patient's physician," and that "he forged patients' signatures" on claim forms.

Counts VII-IX, on which he was convicted, alleged violation of 42 U.S.C. § 1395 nn (a)(1). Defendant was charged with writing in the names of physicians on Line 19 of the Medicare claim form, and in writing the names of patients on signature Lines 12 and 13 of the form. He was convicted of making a false statement or representation of a material fact under the statute.

The claim form, Line 19, requested "name of referring physician or other source." Line 12 asked for "patient's or authorized person's signature," and Line 13, an authorization for payment, was to be signed by "insured or authorized person," which apparently refers to the patient or his representative.

There is no question that defendant performed the services for which he submitted claims. Dr. Cegelka has a masters degree in educational psychology and a doctorate in special education with emphasis on mental retardation. He has concentrated on using psychological testing to evaluate mentally disabled persons, and to design training programs to improve ability to function. He has been education chairman for the National Association of Retarted Citizens (1969-1977), was named educator of the year, and authored that Association's national policy statements. He has served on the President's Committee on Mental Retardation and was a member of the National Accreditation Council which developed standards for quality patient care at residential facilities. He has experience in designing treatment plans for persons in residential facilities, including geriatric patients, and has over 30 publications in the field.

His conviction on counts VII-IX concerns only whether Dr. Cegelka, in writing the names of physicians on Line 19, and in writing the names of patients on signature Lines 12 and 13, intended to deceive.

The question concerning physician referral centers on whether the insurance company newsletters, which define claims requirements, were ambiguous. It is the government's theory that the defendant had a responsibility *personally to receive* from the physician a referral of the patient *to him* before he was authorized to test and file a claim. Defendant contends that Line 19 only represents that the physician had referred the patients, as defendant's evidence contends he believed, but not that he *personally* had received a referral from the physician. The divergent views present entirely different questions as to the knowledge and intent chargeable to the defendant Dr. Cegelka, and required under 42 U.S.C. § 1395 nn (a)(1).

It was not disputed that the patients were unable to sign, that Dr. Cegelka wrote the patients' names and that he made no effort to disguise his handwriting. Witnesses for the insurance company, which was the Medicare fiscal agent, testified to con-

flicting instructions given to health providers concerning patients unable to sign, and Dr. Cegelka testifed to his good faith efforts to follow conflicting instructions.

At trial, and on appeal, defendant contended that 42 U.S.C. § 1395 nn (a)(1) requires proof of intent to deceive. If so, the district court erred in refusing to give a requested "good faith" instruction, which was supported by the evidence, and in failing to instruct the jury that intent to deceive was an essential element of the crime. Defendant's proffered instruction would have informed the jury that an essential element of the crime was "an intent to deceive" and that "good faith on the part of the defendant is a complete defense . . ."

The Court of Appeals upheld rejection of defendant's separate jury instruction, holding: "By the clear language of § 1395 nn (a)(1) specific intent to deceive or defraud is not an element of the offense." (slip opinion, p4).

The Court of Appeals and the trial court also rejected defendant's contention that the insurance company newsletters are vague and do not provide necessary due process notice as to what constitutes criminal activity. The newsletters did not advise that defendant must receive an direct referral from a physician, and the evidence was insufficient to show that Dr. Cegelka had the knowledge required by 42 U.S.C. § 1395 nn (a)(1) that Line 19 represented that he had received such a referral.

Trial of the case lasted two full weeks, involving 34 witnesses and volumes of documents. After 14 hours of deliberation, the jury acquitted on the mail fraud counts, I-III and convicted on the false statement counts, VII-IX.

REASONS FOR GRANTING THE WRIT

Introduction

This case raises two issues of profound importance in the criminal law, which go beyond the individual circumstances of Dr. Walter J. Cegelka:

1. Dr. Walter J. Cegelka, a noted and respected psychologist and educator, was convicted on three counts of knowingly and willfully making false statements on Medicare payment applications, in a proceeding in which the Government was *not* required to prove that he had intent to deceive, and where Dr. Cegelka was denied the opportunity to have the jury instructed that his "good faith" was a defense, where he introduced evidence of good faith to negate an intent to deceive.

2. The trial court and the Court of Appeals allowed the Government to rely upon the "law" as set forth in two newsletters published by a private insurance company that was fiscal agent for the federal Medicare program. These newsletters were ambiguous and failed to specify that the conduct engaged in by Dr. Cegelka was improper. This case thus presents a "twist" on the venerable due process principle that the *law* must put a person on notice as to what conduct it forbids, for the "notice" consists of ambiguous statements in newsletters published by a private insurance company.

As to the first issue, this case also raises the question of whether a defeandant who makes out an adequately supported defense of good faith is entitled to a separate jury instruction on that issue, where an intent to deceive or defraud would be negated by the jury's acceptance of his claim of good faith. In mail fraud cases, there appears to be a split of circuits; see *Green v. United States,* ____ U.S. ____, 106 S.Ct. 259, 88 L.Ed.2d 266 (1985) (dissenting opinion of Justices White and Brennan to denial of Petition for Writ of Certiorari).

ARGUMENT

I.

Intent To Deceive Is An Element Of The Crime Of Making A False Statement On A Medicare Payment Application, 42 U.S.C. Sec. 1395 nn (a)(1). Thus, Where A "Good Faith" Finding Would Negate Intent To Deceive, Defendant Should Be Entitled To Such An Instruction Where The Instruction Is Supported By The Evidence.

The same underlying conduct — filling in a physician's name on the referral line of the Medicare form and filling in the patient signature lines — formed the basis for prosecution under both the mail fraud statute, 18 U.S.C. § 1341, and under the statute prohibiting knowingly making false statements on Medicare applications, 42 U.S.C. § 1395 nn (a)(1), repealed effective August 18, 1987, 101 Stat.689.

Dr. Cegelka was acquitted on the mail fraud charges, and convicted on the false Medicare statement charges.

What was the difference?

On the mail fraud charges, the jury was instructed that the Government must show that defendant "devised or intended to devise a scheme or artifice to defraud." The jury instructions are quite clear that the conduct under the mail fraud statute is that which is done with intent to defraud or to deceive. The jury was so instructed *four* times.

On the other hand, the essential elements instruction on the counts for false Medicare statements requires only that "the defendant knowingly and willfully made or caused to be made any statement or representation of fact, . . ." and that the statement was material, and that it was false as the defendant "then knew." Thus, under the instructions as given by the trial court and approved by the Court of Appeals, the defendant could be convicted for "knowingly and willfully" making a statement that was false, even though he had no intent to deceive.

Clearly the critical words in the statute, 42 U.S.C. § 1395 nn (a)(1), are "knowingly and willfully." Congress added these words by amendment in 1980. The legislative history states that Congress was concerned that criminal penalties may be imposed for conduct "while improper, was inadvertent." (1980 U.S. Code Congr. and Admin. News, Legislative History, P.L.96-499, p.5572).

This statute, by its terms, seeks to reach one who knowingly and willfully makes a false representation for the purpose of obtaining Medicare benefits. Congress clearly intended to exclude acts done with honest belief, and intended to reach only those acts done with deceptive intent.

The statutory phrase is used in the essential elements instruction in the first paragraph as follows.

> "*First:* That the defendant knowingly and willfully made or caused to be made any statement or representation of fact in an application for a benefit or payment from Medicare; . . ."

The problem with this placement of "knowingly and willfully" is that is modifies the act of making a statement rather than focusing on whether the defendant "knowingly and willfully" did so in a mammer evidencing an intent to deceive.

Dr. Cegelka's good faith instruction would have placed before the jury the issue of whether, by his conduct, he intended to deceive. The evidence supported Dr. Cegelka's proposed submission.

As to the statement about a physician's referral, there was evidence supporting submission of such an instruction: Dr. Cegelka was told by the nursing home administrator that she would obtain a physician referral; the nursing home staff verified that the administrator authorized Dr. Cegelka to do psychological testing and that she has selected the patients, and that Dr. Cegelka had spent three weeks performing testing with

the assistance and cooperation of staff in circumstances where the nursing home law obligated the Home to have obtained physician referral. There thus was substantial evidence to believe that it was appropriate to enter the nursing home doctor's name on Line 19 of the Medicare form.

With respect to the patient names, Dr. Cegelka testified that he believed from directions received from the insurance company Medicare agent that actual signatures were not important where the service was provided and the patient was unable to sign. He testified to efforts to follow conflicting instructions and he believed his actions were appropriate. Some insurance company witnesses supported Dr. Cegelka's testimony; they disagreed with each other.

Thus, Dr. Cegelka placed in issue the question of whether he had any intent to deceive, and the jury should have been instructed on this issue.

Proof of specific intent is part of the prosecutor's burden. *United States v. Cacioppo,* 517 F.2d 22, 23 (8th Cir. 1975); *United States v. Yermian,* 708 F.2d 365, 368 (9th Cir. 1983). When such an issue is made by the evidence, it is not adequate simply to assume the burden as to the making of a statement which was known to be false, as these instructions do. The prosecutor must take the additional step of showing specific intent to deceive.

The trial court's instructions with regard to the mail fraud counts demanded a finding of intent to deceive four times. Yet, with respect to the false Medicare statement counts, no such proof was required.

We can assume that the jury noted to differences between the intent required of mail fraud counts (Counts I-III), when the jury exonerated the defendant, and the absence of any reference to intent to deceive with regard to Counts VII-IX, the Medicare false statement counts. Yet, intended deception is the gravamen of both offenses.

In another context, there is a split of authority among the circuits as to whether or not a defendant who makes out an adequately supported defense of good faith is entitled to a separate jury instruction on that issue. The Fifth Circuit in *United States v. Fowler,* 735 F.2d 823, 828 (5th Cir. 1984), and the Tenth Circuit in *United States v. Hopkins,* 744 F.2d 716, 718 (10th Cir. 1984) (en banc), have held that a separate instruction is required, while the courts of appeals in *United States v. Gambler,* 662 F.2d 834, 837 (D.C. Cir. 1981); *United States v. Bronston,* 658 F.2d 920, 930 (2nd Cir. 1981), *cert. denied,* 456 U.S. 915, 102 S.Ct. 1769, 72 L.Ed.2d 174 (1982); and *United States v. Sherer,* 653 F.2d 334, 337-338 (8th Cir. 1981), *cert. denied,* 454 U.S. 1034, 102 S.Ct. 573, 70 L.Ed.2d 478 (1981), hold that a separate instruction, in a mail fraud prosecution, is not required. See *Green v. United States,* ____ U.S. ____ 106, S.Ct. 259, 88 L.Ed.2d 266 (1985), (opinion of Justice White, dissenting from denial of cert.).

This vital question as to the appropriate manner of instructing juries on the intent issue is starkly presented in this case. This is a case where the defendant clearly made an evidentiary showing that places his good faith squarely in issue, and he preserved his point by submission of a clear, simple and non-argumentative instruction.

II.

Dr. Cegelka Was Denied Due Process Of Law Where The Trial Court Permitted The Government To Rely Upon An Insurance Company Newsletter To Specify What Conduct Is Required In Filing Medicare Payment Applications, Particularly Where The Newsletter Was Ambiguous In Describing Such Requirements.

Fundamental justice requires that criminal activity be clearly defined, and that the Government give a person of ordinary intelligence fair notice of what conduct is forbidden by a statute. *United States v. Harris*, 347 U.S. 612, 617 (1954), and *Dunn v.*

United States, 442 U.S. 100, 112 (1979). Due process mandates that "no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited." *Dunn, supra.*

The claim form, and the insurance company newsletters, failed to put the defendant on notice that he was required personally to receive a referral from a physician. The newsletters, described as "Medicare Regulations," and "Medicare News" provided in essentially similar language the following requirements:

> 3. The complete name and address of the physician who ordered the psychological testing must be indicated on the bill or claim form (Gov. Ex. 25).
>
> 5. On the claim form state the complete name and address of the physician who ordered the psychological testing. (Gov. Ex. 18B).

This language is ambiguous, and by no means clearly and unmistakably advises the defendant that he must contact the physician or that he must actually receive anything from the physician. The words only direct the defendant to identify a person who has performed an act.

In the circumstances of this case, Dr. Cegelka was told by the nursing administrator that she would obtain a physician referral, the nursing home staff verified that the administrator authorized Dr. Cegelka to do psychological testing and that she selected the patients, and that he spent three weeks performing testing with the assistance and cooperation of the nursing home staff. Thus, there was, as stated, substantial evidence that Dr. Cegelka had reason to believe that there was a referring physician, that is, the physician for the nursing home.

It is bad enough that the Government relies upon newsletters put out by a private insurance company, under contract to administer Medicare payments, and to treat such newsletters as sources of law. *Cf., United States v. Porter*, 591 F.2d 1048, 1057 (5th Cir. 1979). The violation of due process becomes par-

ticularly obvious when we examine the newsletters and find that they are unclear and ambiguous as to the requirements they purport to set forth on behalf of the Government.

The promulgation of "law" through private insurance company newsletters, and the failure of such "law" to give proper notice as to what conduct is proscribed, raises substantial due process violations that defendant asks this Court to review.

CONCLUSION

The conviction of a defendant for making a false statement "knowingly and willfully" on a Medicare payment application, without requiring the Government to show an intent to deceive, and without permitting defendant to show his good faith to negate any intent to deceive, is a wrong that can only be remedied through this Court's grant of certiorari.

Similarly, the denial of due process inherent in a conviction based in part on the failure to observe vague and ambiguous "law" as set forth in an insurance company newsletter raises a matter of substantial public importance that defendant asks this Court to address.

Accordingly, Dr. Cegelka respectfully prays that this Court grant a Writ of Certiorari.

Respectfully submitted,

JOHN D. SCHNEIDER*
705 Olive Street, Suite 815
St. Louis, Missouri 63101
314-421-2762

MICHAEL A. WOLFF
4144 Lindell Boulevard
St. Louis, Missouri 63108
314-652-7277

Attorneys for Petitioner

**Counsel of Record*

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Eighth Circuit

No. 87-2410

Appeal from the United States District Court
for the Eastern District of Missouri.

United States of America,
Appellee,

v.

Walter J. Cegelka,
Appellant.

Submitted: June 17, 1988

Filed: August 10, 1988
Before ARNOLD, Circuit Judge, ROSS, Senior Circuit Judge, and WOLLE*, District Judge.

Dr. Walter Cegelka was indicted on nine counts relating to a scheme to submit false Medicare claim forms. The trial court[1] dismissed three counts of mail fraud because of failure of proof of the mailings. The jury acquitted Cegelka on another three counts of mail fraud, and convicted him on three counts of making false representations of material fact on Medicare claim

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* Honorable Charles R. Wolle, United States District Court Judge for the Southern District of Iowa, sitting by designation.

[1] The Honorable William L. Hungate, United States District Court Judge for the Eastern District of Missouri.

forms in violation of 42 U.S.C. § 1395nn(a)(1)[2]. Cegelka appeals his conviction, alleging that: 1) the trial court erred in failing to give the jury a good faith instruction and an instruction on specific intent to deceive; 2) Cegelka was denied due process because the Medicare newsletters setting forth claim requirements were vague; and 3) there was insufficient evidence for the jury to convict him. For the reasons set forth below, we affirm.

The charges against Cegelka, a psychologist, arose in relation to his submitting claim forms to Medicare for payment for psychological testing which he allegedly did on sixteen residents of the Villa Capri Nursing Home in St. Louis County, Missouri. The Home's administrator, Jane Forness, testified that Cegelka approached her and stated that he wanted to do psychological testing on the Home's residents for a paper he was writing. Forness told Cegelka that he would have to get approval from the residents' physicians before the testing could be performed. She further testified that she never gave Cegelka permission to test any of the residents. There was conflicting testimony as to whether the testing was actually performed.

Pursuant to the requirements of Medicare, a psychologist can bill Medicare for psychological testing only when that patient's

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[2] The statute under which Cegelka was convicted, 42 U.S.C. § 1395nn(a), was repealed on August 18, 1987, Medicare and Medicaid Patient and Program Protection Act of 1987, Pub. L. No. 100-93, § 4(e), 101 Stat. 689 (1987). Although Cegelka was convicted on September 4, 1987, after the effective date of repeal, his conviction is unaffected by the repeal because his acts occurred and the indictment was returned before the repeal of the statute. *See* 1 U.S.C. § 109 ("The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper • • • prosecution for the enforcement of such penalty, forfeiture, or liability."). *See also United States v. Gourley*, 835 F.2d 249, 250 n.1 (10th Cir. 1987), *cert. denied*, 108 S.Ct. 1741 (1988).

physician ordered the testing.[1] However, rather than get the residents' physicians' approval, Cegelka simply took the physicians' names from the residents' medical charts and filled them in on the Medicare forms. Cegelka testified at trial that he thought Forness had obtained the physician approval, although Forness testified that she never attempted to get the physician approval, nor did she indicate to Cegelka that she would do so. The residents' physicians testified that they had never heard of Cegelka and had never ordered the testing. The physicians further testified that many of their patients could not participate in or would not benefit from psychological testing because of their mental or physical conditions.

In addition to improperly filling in the physicians' names on the claim forms, Cegelka also improperly signed the patients' names on the forms. The forms had separate boxes which stated "Patient's or Authorized Person's Signature" and "I authorize payment of medical benefits to undersigned physician or supplier for service below." On each form, Cegelka either signed the patient's name or put "unable to sign." On some of the forms where he put the patient's signature, Cegelka also put his own initials.

When a criminal investigation of the matter began by investigators from the Department of Health and Human Services, Cegelka denied that he signed the patients' signatures. However, he later admitted doing so, stating that personnel at General American Life Insurance Company, Medicare's administrator in Missouri, told him to fill out the forms in that

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[1] The instructions for filling out the Medicare claim forms provided in part:

> On the claim form state the complete name and address of the physician who ordered the psychological testing.
>
> State the physician's diagnosis of the patient which would establish medical necessity for psychological testing.

manner. General American personnel denied telling Cegelka that he could fill out the forms as he did.

Cegelka's position at trial was that, in signing the patients' names on the Medicare claim forms, he thought he was filling out the forms in the proper manner in accordance with the confusing instructions he received from General American personnel. With regard to his putting the physicians' names on the claim forms, Cegelka's defense was that he reasonably believed that the staff at the nursing home had secured the physician referrals for him. Cegelka requested the following good faith instruction:

> Since an essential element of the crimes charged is * * * an intent to deceive * * *, it follows that good faith on the part of the defendant is a complete defense to the charges. A defendant, however, has no burden to establish a defense of good faith. The burden is on the Government to prove fraudulent intent and deceptive purpose * * * beyond a reasonable doubt.

Cegelka's first argument on appeal is that the trial court erred in refusing to give his good faith instruction and in failing to instruct the jury that specific intent to deceive was an element of the offense charged. A defendant is entitled to his theory of the defense if it is timely requested, supported by the evidense and states the law correctly. *United States v. Jerde*, 841 F.2d 818, 823 (8th Cir. 1988). 42 U.S.C. § 1395nn(a)(1) prohibits a person from "knowingly and willfully mak[ing] or caus[ing] to be made any false statement or representation of a material fact in any application" for Medicare payments. By the clear language of § 1395nn(a)(1), specific intent to deceive or defraud is not an element of the offense. A review of the instructions given the jury indicates that the trial court correctly instructed the jury as to the elements of making a false claim for Medicare payments. Further, the court properly instructed the jury as to the definitions of the terms "knowingly" and "willfully." The court also instructed the jury that it had to find that Cegelka had the re-

quisite specific intent, in that he "knowingly did an act which the law forbids, purposely intending to violate the law." Therefore, we find that the trial court did not err in refusing to give Cegelka'a proffered instructions.

Cegelka next argues that his conviction violates due process because the Medicare newsletters and claim forms did not clearly state that he personally had to receive the physician's referral. Cegelka's primary defense at trial was that he rightfully believed the personnel at the nursing home had obtained the physicians' referrals because the nursing home had allowed him to do the testing. Therefore, he contends that he was convicted not for knowingly making a false statement, but for not personally receiving the physicians' referrals, which he argues is not clearly proscribed by law.

Cegelka's argument is without merit. A review of the record indicates that the jury could not have convicted him for simply failing to obtain the referrals personally, despite his belief that the nursing home had obtained the referrals for him. The indictment specifically charged that Cegelka indicated on the claim forms that he had a physician's referral despite knowing that there was no such referral. The jury was informed as to the allegations in the indictment. Further, the jury was instructed that an element of the crimes charged was that Cegelka knew the statements on the claims forms were false. Therefore, contrary to Cegelka's contention, the jury did not convict him simply for failing to obtain the physicians' referrals, but instead convicted him for knowingly falsely stating in the Medicare claim forms that he had such referrals. Such conduct is clearly proscribed by 42 U.S.C. § 1395nn.

Finally, Cegelka argues that there was insufficient evidence to support his conviction. Cegelka contends that the evidence showed that he reasonably believed the personnel at the Home had obtained the physicians' referrals, and that therefore his representations in the claim forms were not false.

In considering a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the government, giving to the government the benefit of all reasonable inferences that logically may be drawn from the evidence. *Rothgeb v. United States*, 789 F.2d 647, 648 (8th Cir. 1986). We will not overturn the verdict unless the evidence is such that reasonable minded jurors must have a reasonable doubt as to the existence of any of the essential elements of the crime. *Id.* The credibility of the witnesses is to be determined by the jury. *United States v. Scott*, 668 F.2d 384, 388 (8th Cir. 1981).

Considering the evidence in the light most favorable to the government, we find that there was sufficient evidence for the jury to find that Cegelka knew that there were not physician referrals when he filled out the Medicare claim forms. Forness, the nursing home administrator, testified that she neither told Cegelka nor did she lead him to believe that she would get the physicians' referrals for the testing. All the physicians in question stated that they knew nothing of the testing, nor did they ever receive any test results. There were no notations made in the residents' medical files or records to indicate to Cegelka that the physicians had approved the testing. We conclude that there was more than sufficient evidence to support the jury's verdict.

For the foregoing reasons, the conviction of Walter Cegelka is affirmed.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Eighth Circuit

No. 87-2410-EM

Appeal from the United States District Court
for the Eastern District of Missouri

United States of America,
Appellee,

v.

Walter J. Cegelka,
Appellant.

Appellant's petition for rehearing en banc has been considered by the Court and is DENIED.

Petition for rehearing by the panel is also DENIED.

September 28, 1988

Order Entered at the Direction of the Court:

/s/ Robert S. St. Vrain

Clerk, United States Court of Appeals, Eighth Circuit.